

# The Rule of Law in a European Economic Area with National “Room for Manoeuvre”

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The former president of the EFTA Court, [Carl Baudenbacher](#), lashes out at more or less the entire Norwegian legal community in his attempt to explain how Norway’s social security authorities (“NAV”) have come to misinterpret Regulation 883/2004 on the coordination of social security systems for years, and how public prosecutors, defence lawyers, judges, academics and the EFTA Surveillance Authority all failed to reveal this. This reply challenges his narrative and attempts to explain how use of the “room for manoeuvre” that EU/EEA law leaves to the national legislator can very well be combined with loyal fulfilment of EEA law obligations in an EEA based on the rule of law.

According to Mr. Baudenbacher, the failure of Norwegian authorities to recognize that the right to cash benefits under Norwegian social security law cannot be made conditional upon the recipients remaining at all times on Norwegian territory, is the result of a 25 year long campaign by Norwegian lawyers to obstruct the effect of EU/EEA law in Norway. In his narrative, this ‘collective defensive attitude of scholars, politicians, bureaucrats, and judges against EEA law’ sets Norway apart not only from the two other EFTA States in the EEA, Iceland and Liechtenstein, but also from all of the 28 EU Member States. In short, Norway is a “chauvinist”, anti-European and generally untrustworthy partner – the worst member of the entire EU/EEA club. All governments at least since 2008 have officially adopted a “Norway first”-policy that blatantly violates the principle that obligations flowing from international treaties are to be fulfilled in good faith. The courts have all somehow accepted this, so their apparent independence from the other branches of government must be only a smokescreen. The same is true for Norwegian lawyers who represent private parties in EEA-law cases against Norwegian authorities, as they neglect their clients’ interest in order to support the government’s anti-European strategy. As marionettes of the government, the academics at the law faculties are no better (with some very few exceptions). It is quite an outburst. If even close to correct, it is devastating to Norway’s rule of law credentials and standing as a credible partner of the EU.

## Countering the narrative

As Mr. Baudenbacher appears to count the EFTA Surveillance Authority among the institutions captured by the Norwegian government, references to the Authority’s assessment that Norway generally implements EU-law in a timely and correct way is unlikely to impress him. Nevertheless, others may be interested to know that in the Authority’s latest “[Internal Market Scoreboard](#)” (July 2019), Norway

fared quite well – e.g. with a respectable 7<sup>th</sup> place in the all EU/EEA competition to transpose directives in time, and with a quite “normal” number of pending infringement proceedings. Furthermore, the independence of the EFTA Surveillance Authority vis-à-vis the EEA/EFTA States appear to be generally appreciated by the European Commission. As the two “watchdogs” cooperate closely (Article 109 EEA Agreement), there is hardly anyone better positioned to assess the work of the EFTA Surveillance Authority than the Commission. Thus far, the Commission has not sounded any alarm.

As to the current NAV scandal more specifically, the EFTA Surveillance Authority may well be criticised for not having discovered of its own motion that Norwegian authorities failed to give full effect to Article 21 of Regulation 883/2004 on the coordination of social security systems. However, thus far there is no evidence to suggest that the Authority was made aware of the matter and then decided to look another way. It is important to note that the implementation of the regulation into Norwegian law was technically correct, and that Norwegian authorities had assured the EFTA Surveillance Authority that the general rules of Norwegian social security law was to be set aside to the extent necessary to comply with EU/EEA law obligations. The problem was “only” that Norwegian authorities failed to recognize the reach of those obligations.

If the assessment of the EFTA Surveillance Authority is deemed insufficient, the [conclusions from the most recent meeting of EEA Council](#) (November 2019) may be of interest. According to those, adopted jointly by the three EEA/EFTA States and the EU, the EEA Agreement generally works well as “a solid basis for a broad and strong relationship among the parties”. The recently released [minutes from the previous meeting in May](#) this year points in the same direction. As in previous meetings, the EU representatives certainly do not brush the challenges to the continued success of the EEA Agreement under the carpet, but Norway systematically undermining the effect of EEA law is not on the list. The same is true for the EU Council’s most recent [conclusions on the Union’s relations with non-EU Western European countries](#) (December 2018), where it is stressed that the “excellent” relationship between Norway and the EU is based on shared values, “notably respect for human rights and democratic principles”. If compared to recent EU assessments of the rule of law credentials of some of the EU’s own member states, one may question whether Norway really is the worst member of the entire family.

Further, if Mr. Baudenbacher’s narrative was correct, one should expect an influx of complaints against Norwegian authorities to the EFTA Surveillance Authority, to the Commission, to the European Court of Human Rights etc., at least from foreigners represented by non-Norwegian lawyers. However, no such development has been reported.

As to the national courts, it is true that their relationship to the EFTA Court has not always been the best. The lack of referrals from Norwegian courts to the EFTA Court has been criticized, even by some of us chauvinist professors, and this seems to have had some effect. Indeed, if due account is taken to the size of the country and

the caseload of the Supreme Court, the number of referrals from the justices in Oslo in the last couple of years compare favourably with those of the highest court of several EU Member States.

It is also true that there have been a few occasions on which Norwegian courts have disagreed with the interpretation of EEA law advocated by the EFTA Court in an advisory opinion, but only in cases where it could reasonably be argued that so would the CJEU if asked to rule on the same matter. It is important to stress here that the jurisdiction of the EFTA Court differs from that of the CJEU, as the EEA/EFTA States were only willing to let the EFTA Court answer questions from national courts by way of advisory opinions (with the EU accepting this). Opinions may well differ as to whether Norwegian courts or the EFTA Court “got it right” in these few cases of disagreement, but it cannot reasonably be considered a rule of law problem that a national court exercises its constitutional right to disagree with an advisory opinion. It may be added that the number of CJEU judgments diverging from interpretations of common EU/EEA rules previously advocated by the EFTA Court, easily exceeds those (very few) from Norwegian courts. The judicial architecture of the EEA is complicated and by no means perfect, but as long as all courts involved apply the same methodology and engage with each other in an [open and constructive dialogue](#), any remaining disagreements will be well within the boundaries of the rule of law.

As to binding judgments from the EFTA Court, e.g. in infringement proceedings brought by the EFTA Surveillance Authority, they have always been complied with by Norway, albeit sometimes with little enthusiasm and on a few occasions rather late. A quick look at CJEU case-law reveals several similar cases from various EU member states, and also quite a few examples of rather more serious non-compliance. That is certainly no excuse for Norwegian authorities in the cases where they have taken too long to react, but it does considerable harm to the “worst in class”-narrative presented by Mr. Baudenbacher.

The same is true if one has a closer look at EEA law cases in Norwegian courts. The principle of State liability for violations of EEA law, one of the examples mentioned by Baudenbacher, was not only acknowledged unanimously by the full Supreme Court back in 2005 ([HR-2005-01690-P](#)); the majority also held the breach in question to be sufficiently serious, thus paving the way for an approach to later such cases that cannot in any way be describes as “State friendly”. The experiences with State liability cases in certain other EU/EEA member states appear to be more mixed, to say the least.

## **False equations and insufficient differentiation**

As to the application of the EU/EEA law principle of proportionality, another category highlighted by Mr. Baudenbacher, it is true that Norwegian courts have sometimes struggled with its application. This, however, cannot justify a “worst in class” label. A [comparison with the other Nordic EU/EEA member states](#) reveals similar challenges, and it is hardly a bold claim that there are examples of national courts also in

other parts of the EEA that have found the EU/EEA law principle of proportionality challenging.

Part of the reason for the characterization of the NAV case as a scandal, is that there is evidence to suggest that the social security authorities for quite some time decided not to appeal unfavourable decisions from the Social Security Tribunal in order to keep the disputed legal question out of the higher courts. If proven, it is indeed an affront to the rule of law which must have consequences for those responsible. It does not, however, fit Mr. Baudenbacher's narrative of captured Norwegian courts. If the judges all adhere to a "Norway first" dogma, surely the authorities would have nothing to fear from letting the Court of Appeal rule on the matter?

The fundamental flaw with Mr. Baudenbacher's outburst is that he believes the so-called "room for manoeuvre" policy to be a legal concept. As professor Hans Petter Graver tries to explain in his [comment to Baudenbacher's post](#), it is not. No Norwegian government have ever claimed that a wish to protect the Norwegian legislator's "room for manoeuvre" is in itself a valid legal argument of relevance to the interpretation of EEA law, nor have any Norwegian court considered it as such. General references to the EU law principle of subsidiarity may perhaps have been made, but that can hardly be characterised as chauvinist.

Contrary to Mr. Baudenbacher's claim, Norwegian authorities' desire to protect the room for national policies that EU/EEA law leaves to the Member States, is very much in line with the rule of law. In fact, much more so than the alternative, which would be to introduce a kind of "safety margin" in all EEA-related matters, to the detriment of the democratically elected legislator.

The name of the policy, in particular in the English translation, is perhaps not the best, as it can be misunderstood to be more than it is: An advice to parliament to 1) enact the laws parliament wants to enact, as long as parliament itself (with the help of the experts in the ministries) sincerely believe those laws to be in line with Norway's EEA law obligations, and to 2) defend such laws in the courts.

Mr. Baudenbacher's claim that no other EU/EEA member state does the same is quite simply wrong. Anyone following the case-law of the CJEU will be able to come up with numerous cases where various EU member states have enacted, and then defended, national rules that the Commission and/or private parties consider to violate EU law. A comparison of the positions defended by the Norwegian government before the EFTA Court (or before national courts) and those defended by the governments of various EU member states before the CJEU, does not in any way support a claim that Norway is a particularly stubborn defendant that wastes the courts' time with attempts to save national rules that clearly violate EU/EEA law (and that therefore should never have been enacted in the first place). It may well be, however, that no other government has felt the need to give this approach to EU/EEA law a particular name. After all, it is no more than a combination of the principles of democracy and legality in an EEA based on the rule of law.

## Focusing on the actual problems

Still, [as pointed out by professor Graver in his post on the NAV scandal](#), application of national laws that test the reach of EU/EEA law does raise questions of legal certainty and effective judicial protection for the individuals involved. This calls for transparency, guidance of private parties and affordable access to the courts, in particular in cases involving ordinary citizens. It also calls for an understanding of the courts as the authorities' best friends in a common mission to honour the obligations that flow from the EEA Agreement. Thus, in the NAV case, rather than trying to avoid the courts, the social security authorities should from the very beginning have informed persons wishing to travel abroad whilst receiving cash benefits from NAV that the interpretation of the EEA rule in question was not obvious, provided legal aid in a test case and then seized the opportunity to let the courts decide the matter. If the government were to clarify that this is the approach to follow in the future, parliament's "room for manoeuvre" can very well be combined with loyal fulfilment of EEA law obligations in an EEA based on the rule of law.

